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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. YURIY SKLYAR, Defendant and Appellant.	C084360 (Super. Ct. No. 16FE021988)

A jury found defendant Yuriy Sklyar guilty of criminal threats against his mother (Pen. Code, § 422),[1] and the trial court found he had served one prior prison term (§ 667.5, subd. (b)). Sentenced to five years' formal probation, defendant contends that (1) insufficient evidence supports his conviction, and (2) the trial court erred by failing to instruct on the lesser included offense of attempted criminal threats. We affirm.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

The victim recanted at trial, denying that defendant had threatened her or that she had been afraid of him. Once it became clear she was retracting her previous story, the trial court permitted the prosecutor to impeach her with her preliminary hearing testimony and with the recordings and transcripts of three 911 calls the victim made on the night of the offense. We begin with the evidence supporting the charges, then give the other evidence offered at trial.

On November 20, 2016, at approximately 1:27 a.m., the victim called 911 to report that defendant, who lived with her, was acting very aggressively. She thought he was on drugs. According to the transcript of the call, the victim (who was not a native English speaker and testified through an interpreter in these proceedings) said, "I scared him." She added that she "lock my door and stay in my room." The 911 dispatcher asked, "Okay, so you're scared of him? Or you did something to scare him?" The victim answered, "I scare him. That's why I called."

After explaining that defendant was her son, the victim said she did not know whether he had mental health issues or weapons. He kept his room locked all the time and she did not know what he had inside. However, she had seen him with a BB gun which he bought the previous month.

The dispatcher advised the victim to stay in her bedroom and wait for officers to come to meet with her.

At 2:02 a.m., an officer called the victim in response to the dispatch. According to the officer's testimony, she told him defendant was asleep and she no longer needed police help.[2]

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[2] At the preliminary hearing and at trial, the victim testified that the police told her to find another place to stay overnight, but she had nowhere else to go.

At 3:14 a.m., the victim called 911 a second time. She said defendant was screaming and "need to go to mental hospital or something." The dispatcher said the officers would be told what she was requesting but it would be up to them what to do when they got there.

The victim said defendant told her he had taken 10 Norco pills and wanted to die. When she came home from work around 1:00 a.m. he looked crazy. He was in the corner, "cover[ing] himself," and he had thrown furniture. He had tried to hurt her, but had not succeeded.

The dispatcher said officers would be there in a couple of minutes and advised her to call back if anything changed in the meantime.[3]

At 7:41 a.m., the victim called 911 a third time. She began, "Hi, um, my son uh, he threatened my life and I would like if you will take him to the jail because he's dangerous." She added that she had called three times that day and had not slept all night. She repeated, "He threatened my life. He said he will kill me." He was there now and "very aggressive." She begged the police to "[p]lease come to and help me . . . [b]efore he kill me." After the transcript specifies "[i]ndistinct shouting in the background," the victim confirmed that that was him, he was very aggressive, and she stated, "I scare him." At times the victim could not answer the dispatcher's questions because she was crying. She said she was in the house alone with defendant, who had been "screaming, yelling all night" and appeared to be on drugs. She asked that defendant be arrested, stating, "He danger from people, he danger from driving." The dispatcher assured her that officers were on their way.

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[3] At the preliminary hearing, the victim testified that the police spoke to defendant, concluded he was not going to leave his room, advised her again to find another place to spend the night, told her to call again if things got worse, and left sometime before 4:00 a.m. They did nothing else, even though they could hear him talking loudly and "speaking weird things" from inside his room.

The victim did not know if defendant had weapons, but "[h]is girlfriend tell me before he have weapons." He was in his bedroom, breaking things and talking to himself; he had previously acted this way once a month, but now it was every week. The victim was in her own room with the door locked.

As the call continued, the victim said defendant was now in the hallway. The transcript indicates a "[b]anging noise," followed by "[b]anging noise and shouting." While the dispatcher asked what was going on, the victim exclaimed, "Oh, he's trying open my door. [(To third party)] No! No!" Over the victim's crying, the dispatcher told her there were three officers walking up to her front door. The victim said she had unlocked that door. Then she said to someone, "Don't touch my door!" The dispatcher said, "They need to go in right now!"

Over "[s]houting in the background," the dispatcher repeatedly told the victim to stay in her bedroom but to get defendant to listen to the police, who were now inside the house. She said he was not listening to them. Finally, they detained defendant.

One of the officers who responded to this call reported that the victim had told him defendant was threatening to kill her and she was very scared. He had tried to get into her room after she locked her door. The officer found a hunting knife on defendant's bed, which had a white substance on it that appeared to match the paint from the victim's door jamb. The jamb had damage consistent with someone trying to break into the bedroom.

The officer, a qualified drug recognition expert, did not think defendant was under the influence of drugs or alcohol or in need of hospitalization.

The victim testified at trial that before she made the first 911 call, she found defendant acting strange in his bedroom, speaking "insane" words that he claimed were prayers; when she asked him to go to bed, he told her not to bother him, then claimed she was keeping him awake. She feared he was on drugs. She called the police not because she was scared of him, but because she was scared for him.

The victim testified that she made the second 911 call because defendant told her he took 10 Norco pills and wanted to kill himself, and she feared he would overdose.[4] When the police arrived and asked if he was trying to kill himself, he told them his mother had made the whole thing up and was keeping him awake. The victim claimed they left too quickly without providing the help defendant needed.

The victim testified further that after the police left, defendant continued to yell and started banging his head on a mirror. She called 911 again, but this time she lied to the police by saying defendant had threatened to kill her; she thought that was the only way she would be able to get them to help him. She was also afraid he might try to drive while under the influence.

DISCUSSION

I

Defendant contends there was insufficient evidence in support of his conviction for making criminal threats, "as [defendant's] conduct was no more than an angry outburst." We disagree.

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . , shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422.)

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[4] According to the victim, defendant had a history of suicide attempts.

A threat to inflict death or great bodily injury need not " 'communicate a time or precise manner of execution' " to come within section 422. (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) Nor does it require " 'an immediate ability to carry out the threat,' " but only " 'that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out.' " (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807.)

"Sustained" fear, as used in section 422, means " 'a period of time that extends beyond what is momentary, fleeting, or transitory.' " (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 808.) Even 15 minutes of fear is enough for purposes of the statute. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.)

"The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat. [Citations.]" (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.)

In determining whether sufficient evidence supports the trial court's findings, we apply the substantial evidence standard. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414.) We "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find [the allegations against the defendant true] beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] . . . [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755; see also *Johnson*, at pp. 576-577.)

An appellant challenging the sufficiency of the evidence must show why the strongest evidence in support of the judgment, viewed in the light most favorable to the judgment, is insufficient. He or she may not meet this burden merely by reciting his or her own evidence or setting out the evidence in the light most favorable to himself or herself. (*Foreman & Clark Co. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Here, the evidence of the victim's 911 calls, together with the testimony of the officer who responded to the last call, constitute more than sufficient evidence that defendant made criminal threats against the victim. Even if her statements in the first call that defendant scared her, he might have weapons, and she had locked herself in her room for fear of him were not enough to establish all the elements of section 422, the last call and the officer's testimony did so. She said he had threatened her life and was trying to break into her locked room; she also repeated the expression, "I scare him," that she had used in her first call. The background noises audible on the 911 tape supported her statement that he was trying to break into her bedroom, as did her outcries begging defendant not to come into her room. The testifying officer who responded to the call confirmed that she said defendant had threatened her life and she was very scared of him. The knife found by the officer in defendant's bedroom bearing traces of paint that appeared to come from the door jamb of the victim's bedroom doorway, and the visible damage to the jamb itself, further bolstered her report of defendant's conduct. Together, this evidence, viewed most favorably to the judgment, showed that defendant made a credible threat to the victim's life which put her in a reasonable state of sustained fear, and which he could have carried out immediately if the police had not arrived when they did.

Defendant fails to meet his burden on appeal because he ignores a good part of this evidence and views what he discusses most favorably to his own position rather than the judgment. He acknowledges that the victim said he threatened to kill her during the last 911 call but skips over most of the substance of that call (as well as its consistency

with her first call in its claim of fear) to argue that the surrounding circumstances do not support the finding of a genuine threat. Instead, he asserts that the victim's story at trial was the most reliable evidence concerning those circumstances, even though the jury clearly did not credit it insofar as it attempted to exonerate defendant.

Defendant also asserts that his actions after the threat did not support the finding he intended the threat to be taken seriously. He relies on *In re Ricky T., supra*, 87 Cal.App.4th 1132 to support this premise. His reliance is misplaced. In that case, the minor made an angry but ambiguous threat to " 'get' " a person who was not present and would have had no way of knowing about the threat at the time, then did nothing to follow up on it. (*Id.* at pp. 1138-1139.) In the present case, defendant acted on his unambiguous threat to kill the victim by trying to break into her bedroom and did not stop his aggressive conduct until he was physically detained.

Substantial evidence supports the verdict.

II

Defendant contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threat. The Attorney General concedes error, but contends it was harmless. The Attorney General's concession notwithstanding, we conclude the court did not err.

An attempted criminal threat is a lesser included offense of making criminal threats, which occurs when "a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear." (*People v. Toledo* (2001) 26 Cal.4th 221, 231, italics omitted.)

The trial court must instruct sua sponte on any lesser included offense as to which there is substantial evidence that defendant committed only that offense and not the

greater offense. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) However, the court has no duty to instruct on a lesser included offense if no substantial evidence would support a conviction on that offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Here, the trial court did not instruct on attempted criminal threat because the parties agreed with the court that there was no evidence for it. The Attorney General asserts the instruction should have been given anyway because the victim testified at two points in the record that "she was not afraid of [defendant] after he threatened her." We agree with the court and the parties that there was no evidentiary basis for the instruction.

At the first point the Attorney General cites, the victim testified: "No, he did not threaten me and no, I was not afraid of him." At the second point, the victim testified that the "fear" she spoke of during one of the 911 calls was "a fear for him" (i.e., defendant). At neither time did the victim state that defendant had threatened her but she did not feel fear. Rather, she stated both times, consistent with her trial testimony as a whole, that defendant did not threaten her at all. That testimony did not support an instruction on attempted criminal threat.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.